

ESTTA Tracking number: **ESTTA244658**

Filing date: **10/24/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91186473
Party	Defendant Apex Pavers, Inc
Correspondence Address	Leslie A. Burgk Leslie A. Burgk, P.A. 900 East Ocean Blvd, Suite D-130 Stuart, FL 34994 leslie@leslieburgk.com
Submission	Answer
Filer's Name	Leslie A. Burgk
Filer's e-mail	leslie@leslieburgk.com
Signature	/LAB/
Date	10/24/2008
Attachments	Apex Answer and ADs.pdf (6 pages)(207028 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APEX, LLC)	Opposition No. 91186473
)	
Opposer,)	Mark: APEX PAVERS (and design)
v.)	
)	Serial No.: 77/243,433
APEX PAVERS INC.)	
)	Filing Date: July 31, 2007
Applicant.)	

APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES

Applicant, APEX PAVERS INC. (hereinafter the "Applicant") hereby files its Answer and Affirmative Defenses to Opposer's Notice of Opposition in this proceeding, and states as follows:

Any and all allegations in the Notice of Opposition not specifically admitted herein are denied. Responding to the Notice of Opposition Preamble, the Applicant denies Opposer's allegations of damage and defers to the Board for all conclusions of law pertaining thereto. The Applicant is without knowledge or information sufficient to form a belief regarding the correctness of Opposer's address and its corporate status, and therefore denies the same. The Applicant admits that the Preamble correctly identifies the Applicant's APEX PAVERS (and design) trademark, the corresponding application serial number, and the recitation of services set forth in Applicant's application.

The numbered allegations are responded to as follows:

1. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

2. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

3. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

6. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

7. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

8. Applicant admits the allegations contained in Paragraph 8 of the Notice of Opposition.

9. Applicant admits the allegations contained in Paragraph 9 of the Notice of Opposition.

10. Responding to the allegations made in paragraph 10 of the Notice of Opposition, the Applicant repeats, re-alleges and incorporates herein by reference Applicant's responses to the Preamble and paragraphs 1-9 of the Notice of Opposition.

11. Applicant denies the allegations contained in Paragraph 11 of the Notice of Opposition.

12. Applicant denies the allegations contained in Paragraph 12 of the Notice of Opposition.

13. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Notice of Opposition, and therefore denies the same leaving the Opposer to establish proof thereof.

14. Applicant denies the allegations contained in Paragraph 14 of the Notice of Opposition.

15. Responding to the allegations made in paragraph 15 of the Notice of Opposition, the Applicant repeats, re-alleges and incorporates herein by reference Applicant's responses to the Preamble and paragraphs 1-14 of the Notice of Opposition.

16. Applicant denies the allegations contained in Paragraph 16 of the Notice of Opposition.

Applicant denies that Opposer is entitled to the grant of any of the remedies recited in the Prayer for Relief of the Notice of Opposition.

AFFIRMATIVE DEFENSES

The Applicant sets forth below its affirmative defenses. In setting forth these affirmative defenses, the Applicant does not assume the burden of proving any fact, issue or element of a cause of action where such burden properly belongs to the Opposer. The Applicant further

reserves the right to present such other affirmative defenses and counterclaims that may be determined upon discovery.

FIRST AFFIRMATIVE DEFENSE

The Notice of Opposition fails to state a claim upon which relief may be granted and on which the Notice of Opposition may be sustained.

SECOND AFFIRMATIVE DEFENSE

Opposer will sustain no damage, injury, or prejudice as a result of the registration and continued use the Applicant's mark as set forth in Applicant's application.

THIRD AFFIRMATIVE DEFENSE

Opposer's claims are barred by the doctrine of unclean hands, because, upon information and belief, Opposer knew or should have known of marks in use for substantial periods of time by unrelated third parties and registrations of marks registered for substantial periods of time to unrelated third parties, which include the term APEX alone or in combination with other terms and/or designs.

Opposer's claims are further barred by the doctrine of unclean hands because Opposer brought this Opposition based upon its alleged rights in and to its purported "APEX" marks, when Opposer knew or should have known its alleged rights are not broad enough in scope to include the Applicant's services and therefore this action was brought in bad faith.

FOURTH AFFIRMATIVE DEFENSE

Opposer cannot demonstrate valid priority and/or likelihood of confusion between any one or more of the Opposer's pleaded "APEX" marks and the Applicant's mark APEX PAVERS (and design).

FIFTH AFFIRMATIVE DEFENSE

Opposer cannot demonstrate that any of its pleaded "APEX" marks are famous and therefore entitled to dilution protection.

SIXTH AFFIRMATIVE DEFENSE

Opposer cannot demonstrate that the Applicant's APEX PAVERS (and design) mark dilutes or is likely to dilute any one or more of Opposer's pleaded "APEX" marks.

SEVENTH AFFIRMATIVE DEFENSE

Opposer's alleged rights in its pleaded marks that include the term "APEX" are narrow and limited in scope because the marks that include the term "APEX" are weak.

EIGHTH AFFIRMATIVE DEFENSE

Opposer's alleged rights in its pleaded marks that include the term "APEX" are narrow and limited in scope because of widespread third party use and numerous third party registrations of marks that include the term APEX.

NINTH AFFIRMATIVE DEFENSE

Opposer's requested relief is barred by the equitable doctrines of laches, estoppel and/or acquiescence.

WHEREFORE, the Applicant, APEX PAVERS INC., respectfully requests that the Opposition be dismissed, and that Application Serial No. 77/243,433 for the APEX PAVERS (and design) mark be forwarded on for issuance of a registration.

Dated: October 24, 2008

Respectfully Submitted,

LESLIE A. BURGK, P.A.

By: /LAB/
Leslie A. Burgk

Attorney for Applicant
900 East Ocean Blvd, Suite D-130
Stuart, Florida 34994
Telephone 772.600.2677
Facsimile 772.408.8086
leslie@leslieburgk.com

CERTIFICATE OF ELECTRONIC FILING

I HEREBY CERTIFY that the foregoing Answer and Affirmative Defenses is being submitted electronically through the Trademark Trial and Appeal Board's ESTTA System on this 24th day of October 2008.

By: /LAB/
Leslie A. Burgk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the correspondent of record for the Opposer this 24th day of October 2008:

Mr. Andrew Gates
Apex, LLC
100 Main Street
Pawtucket, Rhode Island 02860

By: /LAB/
Leslie A. Burgk